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LAW OF BAILMENT

BY

ORVILLE W. COOLIDGE

1911
Circuit Judge of the Second Judicial Circuit of Michigan

AMERICAN CORRESPONDENCE SCHOOL OF LAW
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① W. Coolidge

BIOGRAPHICAL SKETCH
OF
ORVILLE W. COOLIDGE.

Orville W. Coolidge was born in Edwardsburg, Cass County, Michigan, in 1839.

After passing through the grammar schools, he entered Michigan University where he graduated in 1863, and later on in due course graduated from Harvard Law School in 1865 with the degree of LL.B.

After graduating, he immediately entered upon the practice of law, locating at Niles, Michigan. His practice steadily grew and he participated in many important lawsuits, meeting with marked success. In 1893 he was singled out by his fellow practitioners and selected as Circuit Judge of the Second Judicial Circuit of Michigan.

When his term of office expired, he was re-elected. Again, acknowledged by all to be one of the most efficient and popular judges, in 1905 he was re-elected, this time without opposition, and is now serving his third term.

His career on the bench has been marked with distinction and his opinions have always been painstaking and respected.

His service on the bench of nearly sixteen years has given him a distinction scarcely equalled by but few lawyers.

His lecture on Bailments, delivered to the students of the American Correspondence School of Law, carries with it not only the expression of ripe experience, but also the thought of one who has throughout life maintained a high character for integrity and fidelity to the trust bestowed upon him.

LAW OF BAILMENT

I.

Bailment, which is derived from the French word, "bailler," "to deliver," is defined as a delivery of personal property by one party to another, to be held according to the purpose or object of the delivery and to be returned when that purpose is accomplished, or otherwise dealt with according to the directions of the Bailor. The party delivering is called the "Bailor" and the party receiving, the "Bailee." The principles of the English Law of Bailment were first systematically and tersely expounded in the famous opinion of Chief Justice Holt, one of the most eminent and enlightened of the English judges in the case of *Coggs vs. Bernard* two centuries ago. In Lord Campbell's *Lives of the Chief Justices of England*, the author says that "in a short compass Holt expounded the whole Law of Bailment with admirable clearness and accuracy." The fundamental doctrines of the Law of Bailment as laid down by Holt still remain to a large extent the law both in England and the United States, although the Law of Bailment has since been applied to new conditions which did not exist in Holt's time, and its general scope and field of operation have been greatly enlarged. The immense increase in the development of new methods and facilities of handling and transporting goods and chattels in recent years have made the Law of Bailment one of great importance.

Questions requiring nice discrimination and clear investigation are constantly arising, growing out of the complicated transactions involved in the transportation and management of personal property by transportation

companies, by land and by water, by express companies, wharfingers, warehousemen, banks and other classes of Bailees.

The object of this Review of the Law of Bailment is to give simply a general view of the fundamental principles of the common law governing the relation of Bailor and Bailee.

These principles have to some extent been modified by statute in different states and the rights and liabilities of certain classes of Bailees have been lessened or extended thereby.

II.

ESSENTIAL ELEMENTS OF A BAILMENT.

The Contract may be oral or written, express or implied by law where no express agreement exists. It is essential to constitute a contract of Bailment that the title to the property delivered shall remain in the Bailor. In this respect a Bailment differs from a sale, for while the title to the property in the latter passes to the vendee, in the former it remains unchanged in the Bailor. The Bailee is under obligation to return the article bailed to the Bailor, or to deliver it according to his directions at the termination of the Bailment. In a sale there is no obligation on the part of the vendee to return the specified article, but the party receiving it may return another thing of equal value in the form of money or otherwise.

It is not always essential that the Bailee should return the identical article received by him to the Bailor. Thus when grain is deposited in a warehouse or elevator, to be commingled with other grain, the Bailee may, according to the custom of trade, return an equal amount of grain of the same kind and grade.

So the article returned may not in certain cases be identical in form with that received. Thus materials may be sent to be manufactured into goods to be returned. So

the delivery of milk to be manufactured into cheese and butter for the people constitutes a Bailment.

When property is received by one person from another with the understanding that the former may purchase it on certain terms and conditions and that if he pays for it within a certain specific time he shall become the owner, but that if he does not pay for it within the specified time he shall pay for the use of the article, the contract is one of Bailment and not of sale.

III.

KINDS OF DEPOSIT.

According to the most common classification there are five kinds of Bailment, viz.: Deposit, Mandate, Gratuitous Loan, Pledge or Pawn, and Bailments for Hire.

Deposit is generally defined as a naked Bailment of goods and chattels, which are to be kept for the depositor without reward, and to be returned whenever the depositor demands it.

Mandate occurs when it is agreed that the Bailee shall do some particular act with regard to the article delivered to him without reward.

Gratuitous Loan arises when it is agreed that the Bailee may use the article delivered to him for a certain time or until demand without paying for the use.

Pledge or Pawn is a Bailment of personal property when the Bailee receives and holds the article delivered to him as a security for the payment of some debt or for the fulfillment of some obligation incurred by the Bailor to the Bailee.

Bailments for Hire include those kinds of Bailments in which the Bailee hires the use of the bailed article or in which he is hired by the Bailor to perform or bestow some labor or services upon it. The latter class includes the keeping of goods by a warehouseman and the carriage of goods for hire.

IV.

DUTIES OF BAILEE.—DEGREES OF DILIGENCE.

In carrying out the trust involved in every contract of Bailment, a certain degree of diligence is required of the Bailee, the degree of diligence depending upon the nature of the Bailment to be hereafter referred to. Diligence in this connection is divided into three degrees, viz.: Ordinary Diligence, Extraordinary Diligence and Slight Diligence.

Ordinary Diligence is that diligence which persons of common prudence exercise over their affairs in the community and age in which they live. The correlative term often used in lieu of the phrase "want of ordinary diligence" is ordinary negligence.

Extraordinary Diligence. This is that diligence which very prudent persons take of their own concerns. The correlative term for the phrase "want of extraordinary diligence" is slight negligence.

Slight Diligence is that diligence which persons of less than common prudence or of no prudence take of their own concerns. The correlative term for the phrase "want of slight diligence" is gross negligence.

Several courts of high authority have criticized the use of words denoting comparative degrees of negligence as of doubtful use or application.

See *N. Y. R. R. Co. vs. Lockwood*, 17 Wall (U. S.), 382; *Steamboat New World vs. King*, 16 How. (U. S.), 474.

Whether the appropriate degree of diligence has been exercised in a given case depends upon the circumstances of each particular case. Whenever the facts are at all in controversy the question is one of fact for the jury. In determining this question the age, the country and the condition of society, in which the Bailee lives, the customs and usages of trade, the nature and the value of the thing bailed and its liability to loss or injury must be considered.

V.

DEGREE OF DILIGENCE IMPOSED UPON DIFFERENT CLASSES
OF BAILEES.

(1) When the Bailment is solely for the benefit of the Bailor and the Bailee has no reward, the latter is only liable for the exercise of slight diligence and is therefore only responsible for losses occasioned by gross negligence. Thus if a person about to go away from home leaves an article for his own benefit and convenience with his neighbor without reward to the latter to be kept till the Bailee shall return home, the Bailee is only liable for the exercise of slight diligence and is responsible for loss of or injury to the article only in case of gross negligence on his part.

(2) In case of gratuitous loan or when the Bailee borrows an article from the Bailor without hire or reward and for the sole benefit of the Bailee, the latter is responsible for the exercise of extraordinary diligence over the thing bailed, and is liable for losses occasioned by slight neglect; thus if a person borrow a horse of another without compensation to go on a certain journey, and the Bailee travels in a different direction than agreed upon, or to a greater distance, the Bailee is liable for any injury which may occur to the horse though accidental. The borrower is not liable for inevitable accidents which could not have been foreseen and against which he could not guard, but he is answerable for the least neglect.

(3) When the Bailment is for the mutual benefit of both parties the Bailee is required to exercise ordinary diligence and is answerable only for ordinary negligence. The Bailee in this class of cases in the absence of a special agreement is not generally an Insurer of the goods intrusted to his care. To this rule there are some exceptions as in the case of common carriers to which reference will be made hereafter. The Bailee is not liable for losses occasioned by dangers necessarily incident to

the use of the articles intrusted to his care, nor for the losses occasioned by inevitable accident or irresistible force.

By inevitable accident is meant every casualty produced by physical causes which are irresistible in their nature, such as fire, storm, inundation, perils of the sea or sudden death.

Irresistible force includes the confiscation of goods by military authority, the injuries from a hostile army and losses by robbery or burglary.

Shop-keepers, inn-keepers, restaurant proprietors and bath-house keepers are obliged to exercise ordinary care in the protection of property entrusted to their keeping as an incident to their business. They are not liable however for losses occasioned by accident or by some casualty which occurred without their fault. The same principle applies to an artisan to whom is entrusted materials to work up into manufactured articles for the Bailor.

This principle applies in general to all cases of locatum or hired services in connection with a chattel. Locatum has been divided into four classes: (1) Hiring of a thing for use as hiring a horse and buggy at a livery stable. (2) Hiring of work to be done on a chattel as hiring a tailor to make a suit of clothes from cloth furnished. (3) Hiring of care and service to be rendered about a specific chattel to be kept by the Bailee for him as in the case of a warehouseman, inn-keeper and men who pasture cattle for hire. (4) Hiring of the carriage of goods.

In all these classes ordinary care is required of the Bailee and he is liable for all losses occasioned by ordinary negligence on his part.

VI.

RIGHTS AND LIABILITIES OF BAILOR AND BAALEE GENERALLY.

If the article be lost or injured while in the possession of the Bailee the presumption, according to the weight of modern authority is that the loss or injury occurred

through the default of the Bailee and the burden of proof falls on the Bailee to show that he exercised the degree of care required by the particular contract of Bailment, or that the loss occurred from some cause which *prima facie* excuses him.

A Bailee may by special agreement, as a general rule, limit the extent of his liability but it seems to be established by the weight of authority that he cannot go so far as to prevent his liability for losses occasioned by his own negligence.

So the Bailee may enlarge his liability by special agreement so far even as to become an insurer of the property.

The Bailee is liable for the conversion of the property. This embraces an unauthorized use of the article, such as using it in a different way or for a longer time than that contemplated by the contract. Thus where one hires a horse to go for a specified distance, and he goes beyond that distance, he becomes liable for an unlawful conversion of the horse. So the Bailee cannot sell, pledge, mortgage or exchange the property, and if he do so he is liable for a conversion. The Bailee has no right to use the property in any way not contemplated by the parties to the contract of Bailment.

The Bailee, until the termination of the Bailment, has a special property or possessory right and interest in the article bailed, and may maintain replevin to recover possession from a person wrongfully taking the property or maintain trespass or trover against any person interfering with his possession. As a general rule the Bailee is estopped from denying the title of the Bailor in the property bailed. This rule however is subject to some qualification. Where a third person claims title to the property the Bailee may choose to have the title tried at law, but if he does so, he undertakes the defense at his peril. He can in no case, however, set up title himself or avail himself of the title for his own benefit; he is not liable however for conversion when a paramount title to that

of the Bailor has been established or when the property has been taken from him by due process of law.

Either party may maintain an action against a third person for any wrong done to the property bailed, but a recovery by one is a bar to a recovery by the other. The Bailor may recover possession of the property if sold, pledged or mortgaged by the Bailee to a third person who has taken possession, unless the Bailor has done some act which estops him from claiming the property. This may occur when the Bailee has asserted his ownership to the property with the knowledge of a Bailor and without objection on the part of the latter. So it may occur when the Bailor has allowed the Bailee to so use and manage the property as to amount to a publication to the world that the Bailee is the owner.

VII.

COMPENSATION.

If work and labor are bestowed by the Bailee upon the article bailed he is entitled to compensation unless the circumstances are such that it can be reasonably inferred that the services were to be rendered without compensation. In the absence of an express agreement the law will imply a promise to pay what the services are reasonably worth.

LIEN OF BAILEE.

The Common Law always recognized the right of a tradesman or an artisan to have a specific lien upon the particular article delivered to him for the purpose of having work done upon it, for the price or value of the work done. The right to this lien has however been extended to all cases where value has been conferred upon the thing bailed by his skill and labor, when such lien was not inconsistent with the terms of the contract.

This lien is confined to the particular demand which the Bailee has for work and labor done upon or about the

article bailed. He has no lien as a general rule upon such articles for services rendered at another time or occasion for the Bailor. In a few exceptional cases a general lien has been allowed to secure the payment of a balance arising from mutual dealings. Thus Factors, Insurance Brokers and Wharfingers have been allowed a lien for a balance arising from mutual dealings.

A lien will not attach for services unless the parties to the Bailment contemplate compensation for services, although the law may imply a legal liability to pay the reasonable value of such service.

The lien may be lost or waived by the voluntary surrender of the property by the Bailee or by giving credit to the Bailor, or by accepting a third person as the payor.

VIII.

ENFORCEMENT OF A LIEN.

At common law the lien could be enforced only by keeping possession of the property till payment was made and no sale could be made by the Bailee to secure the payment of his services unless a special agreement to that effect had been made. Courts of Equity have allowed rules to be made in order to enforce the lien in cases where a custom or usage had become well established with regard to a particular trade.

Generally however statutes have been enacted in the different states providing a remedy to enforce a lien by public sale.

IX.

RE-DELIVERY BY BAILEE.

It is the duty of the Bailee to return the property bailed to the Bailor at the time agreed upon for the termination of the Bailment.

When the time is not regulated by agreement the re-delivery must be made within a reasonable time after de-

mand. What is a reasonable time after demand must be determined by the circumstances of each particular case.

Non-delivery is excusable in case the property has been destroyed without the fault of the Bailee or by some act over which he had no control, or when the property has been taken by due process of law, or by a person having paramount title or in case the title of the Bailor has terminated.

It is the duty of the Bailee to give notice to the Bailor of seizure of the property by process.

X.

TERMINATION OF THE BAILMENT.

The Bailment may be terminated by the following causes: (1) By the expiration of the time for which the article was bailed. (2) By the destruction of the article bailed or because it became unfit for the purpose for which it was bailed. (3) By the accomplishment of the object for which the article was bailed. (4) By a rescission of the contract upon grounds recognized as valid by the law of contracts. (5) By an act of illegal conversion of the property by the Bailee.

When the Bailment is for the benefit of both parties and the contract specifies no time for fulfillment, either party may terminate the Bailment by giving notice, the party receiving the notice having a reasonable time within which to comply. The same rule applies to a case of Bailment where it is made for the sole benefit of the Bailor.

So the death of either party may terminate the Bailment.

XI.

SPECIAL CLASSES OF BAILEES.

Finder of Lost Goods. The finder of lost goods becomes a depositary. He can defend his rights as against all but the true owner. It is his duty to restore the goods

to the true owner when discovered. He is not entitled to compensation unless he has been put to necessary expense.

Inn-keepers. An Inn-keeper is one who keeps his house open regularly and for reward for the lodging, refreshing and entertaining of travelers. Saloons, restaurants and boarding houses are not regarded at common law as inns.

The common law was very rigid in requiring the inn-keeper to keep the goods of his guests safely. He was liable for any loss of goods which was not occasioned by the act of God, the public enemy or the negligence of the guest or his servants.

This rule has been modified by some authorities which have held that the Inn-keeper is not liable for losses occasioned by accidental casualties or riots.

The common law liability has been modified in many states by statutes limiting his liability among other things to ordinary baggage necessary for the journey and suitable to the guest's station in life.

The Inn-keeper has a lien to secure the payment of his charges on the goods deposited by his guest.

XII.

COMMON CARRIERS OF GOODS.

A common carrier is one whose business it is to transport goods for hire and who holds himself ready to carry them for all persons who apply and pay the hire. The transportation may be by land or water. A private or special carrier is one who undertakes to carry goods for reward for special persons or on special occasions and who does not make hired transportation his general calling. Within the term "Common carriers" are embraced railroad companies, ferry-men, canal boatmen and owners of carrying vessels.

The subject of common carriers is one of vast scope.

Our purpose in this Review is only to set forth briefly the general and underlying principles which govern the rights and liabilities of common carriers as Bailees of goods and chattels.

XIII.

GENERAL DUTIES.

A common carrier is under obligation to carry all goods tendered to it for transportation, if it holds itself out as willing to carry such goods and is tendered proper charges. The goods must be transported promptly and within a reasonable time. If there is unreasonable delay in the transporting and the delivery of the goods the carrier is liable for whatever losses may result to the shipper as a proximate consequence of the delay. What is unreasonable delay is a question of fact which must be determined from the circumstances of each particular case, such as the state of the weather, the mode of conveyance, the character of the freight, the season of the year, the distance to be transported, and the ordinary facilities of transportation. It is the duty of a Railroad Company not only to accept goods tendered by individual or private shippers but also from connecting lines of transportation, providing that the goods are such as are ordinarily shipped by Railroad Companies and the transportation is according to the usual course of business. The carrier may by public advertisement within proper and reasonable limits designate and fix the nature of the articles which it proposes to transport, and the kind of cars and conveyances which must be used to transport certain classes of goods. He may refuse to carry dangerous articles, such as dynamite, and also goods that are so defectively packed as to entail extra risk. The acceptance of goods by the carrier however is a waiver of all rights to object on these grounds.

XIV.

LIABILITY FOR LOSS OR INJURY TO THE GOODS.

A common carrier of goods is regarded as an insurer for the safe transportation and delivery of the goods entrusted to it for carriage. In this respect the degree of liability of common carrier differs from that of Bailees in general. To this rule there are some exceptions.

The common carrier is not liable for losses occasioned by the act of God or by the public enemy. The act of God or inevitable accident is such irresistible disaster as results at once from natural causes and which cannot be attributed to human agency. This will embrace damage by earthquakes, tempests, floods, lightning, sudden frosts and similar occurrences. The act of God must be the proximate cause of the injury in order to excuse the carrier and the carrier must himself be free from contributory negligence. Accidents from fire, explosions and collisions are not regarded as an act of God.

The carrier is not liable for losses occasioned by an armed force large enough to render resistance fruitless, nor for those occasioned by Indian tribes in a state of war, by pirates and privateers. By the weight of authority the common carrier is not liable for losses occasioned by mobs when it has exercised reasonable care in taking precautionary measures.

XV.

LIMITATION OF LIABILITY BY AGREEMENT.

The common carrier may limit his common law liability by special contract but it has been held by many courts that he cannot be allowed to prevent his liability for his negligence by stipulation. It is well established that he cannot exempt himself from liability for losses occasioned by his own gross negligence. The Supreme Court of the United States has held that the common carrier cannot

limit his liability by special contract so far as to release him from responsibility for losses occasioned by his own negligence, although the contract may be valid, in the state where made.

A general public notice is not sufficient. The modification of the common law liability must be brought home to the notice of the shipper or approved by him before the shipment is made.

What constitutes notice to the shipper has been the subject of some controversy in the Courts. It seems to be held by the weight of authority in the United States that when the shipper accepts a receipt or a Bill of Lading from the common carrier which contains a limitation of the common law liability such instrument is binding on the shipper, when it is not unreasonable or illegal.

XVI.

WAREHOUSEMEN.

A warehouseman is one who receives and stores goods and chattels as a business for compensation and profit.

The warehouseman is under obligation to provide a building for storage, reasonably safe and suitable for the purpose and safe against common and ordinary occurrences. He must use ordinary care and diligence in the protection of the property entrusted to him. What constitutes ordinary care must be determined from the surrounding facts and circumstances. Local usage or custom may govern the degree of care required.

The warehouseman is not liable for losses of goods by fire which are not the result of his own negligence. Nor is he liable for loss by theft when he has exercised ordinary care.

When grain is deposited in a mass a warehouseman must deliver to the depositor an equal amount of the same quality deposited.

EXPRESS COMPANIES.

An express company is regarded as a common carrier and is therefore liable for all losses or damages done to goods intrusted to it for transportation unless such loss or damage was occasioned by the act of God or the public enemy.

If the shipper fraudulently conceals the real nature or value of the goods and thereby misleads the express company the company in any event is liable only for the apparent value of the goods. The express company however, is generally bound to make inquiry as to the value of the goods and the shipper must make a true answer.

The express company is under obligation to deliver the goods to the consignee or his duly authorized agent at his residence or place of business. This may be varied by custom or usage at small way stations when the business is small. In such cases the goods may be held at the station to be delivered there to the consignee upon prompt notice of the arrival of the goods. The custom however must be reasonable, of long continuance and notorious.

If the consignee refuses to or neglects to receive the goods and pay the express charges when sent C. O. D. the company then ceases to be a common carrier and assumes the obligations of a warehouseman. The company must however notify the consignor at once that the goods are held subject to his order.



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